NO. 48897-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BUD FLOWERS,

Appellant.

BRIEF OF RESPONDENT

THOMAS A. LADOUCEUR
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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

Cases

Rules

I. RESPONSE TO ASSIGNMENT OF ERROR

1. There was no error during the resentencing hearing when the prosecutor simply stated the length of the sentence that the court previously imposed.
2. The court did not err when it found defendant's prior Utah conviction was comparable to a Washington crime and counted it in the offender score.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was the prosecutor's statement of the prior sentence inadmissible evidence?
2. Did the court err when it found defendant's prior Utah conviction comparable to a Washington crime and counted it in the offender score?

III. STATEMENT OF THE CASE

The state agrees with Appellant's statement of the case, but adds the following. At the resentencing hearing, the prosecutor stated, "and as the court probably recalls, the court imposed a sentence of 471 months,

previously. Defense counsel replied, "That's correct. That's what the prior Judgment and Sentence indicates. RP 19.

IV. ARGUMENTS

1. THE PROSECUTOR'S STATEMENT THAT THE COURT PREVIOUSLY IMPOSED 471 MONTHS WAS NOT INADMISSIBLE EVIDENCE.

Cowlitz County Superior Court Judge Marilyn Haan originally sentenced defendant to 471 months. This of course was reflected in the first Judgment and Sentence. On remand for resentencing the state introduced the matter by informing Judge Haan of the case history, which included the prior sentence. Appellant characterizes the very mention of the prior sentence as "evidence" to which the evidence rules apply. Appellant further asserts that this "evidence" was inadmissible because it was unfairly prejudicial violating ER 403. This characterization really makes no sense. Simply mentioning the prior sentence does not transform the statement into evidence as that term is customarily used. Appellant cites no authority supporting this characterization.

Assuming for the sake of argument that just mentioning the prior sentence can somehow be construed as evidence, the state makes the following points. First, the defense did not object so the error, if any, is

deemed waived.[1] Second, there was no prejudice because the court's prior sentence was part of the court record and surely something that the judge would already know. Lastly, appellant fails to explain how or why this claimed error justifies the remedy he seeks, eliminating one point from his offender score.

2. THE DEFENDANT'S PRIOR UTAH CONVICTION WAS COMPARABLE TO A WASHINGTON CRIME AND PROPERLY INCLUDED IN THE OFFENDER SCORE.

It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. *State v. Ford*, 137 Wash.2d 472, 479–80, 973 P.2d 452 (1999). While the preponderance of the evidence standard is "not overly difficult to meet," the State must at least introduce "evidence of some kind to support the alleged criminal history." *Ford*, 137 Wash.2d at 480, 973 P.2d 452. *State v. Hunley*, 175 Wash. 2d 901, 909–10, 287 P.3d 584, 589 (2012). If the Washington statute

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[1] RAP 2.5(a); *State v. McGrew*, 156 Wash. App. 546, 551, 234 P.3d 268, 270 (2010), (alleged error raised for the first time not reviewable on appeal unless it is a "manifest error affecting a constitutional right.) *State v. Tuitoelau*, 64 Wash. App. 65, 822 P.2d 1222 (1992), (Defendant, who did not object to prosecutor's unchallenged statements at sentencing and who failed to object to trial judge's oral statement in imposing sentence was deemed to have waived on appeal his right to dispute finding that child was in bed, as basis for exceptional sentence.)

defines the offense more narrowly than the foreign statute, then the sentencing court must determine whether the defendant's conduct, as evidenced in the records of the foreign conviction, would have violated the Washington statute. *State v. Collins,* 144 Wash. App. 547, 182 P.3d 1016 (2008).

The best evidence of a prior conviction is a certified copy of the judgment. *Ford* at 480, 973 P.2d 452. "However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history." *Id.; see, e.g., In re Pers. Restraint of Adolph,* 170 Wash.2d 556, 566, 570, 243 P.3d 540 (2010) (prior driving under the influence conviction proved by Department of Licensing driving record abstract and a defendant case history from the District and Municipal Court Information 911 System (DISCIS); reasoning both are "official government records, based on information obtained directly from the courts, and can be created or modified only by government personnel following procedures established by statute or court rule"); *State v. Vickers,* 148 Wash.2d 91, 120–21, 59 P.3d 58 (2002) (prior conviction proved by certified copy of docket sheet showing guilty plea); *State v. Winings,* 126 Wash.App. 75, 91–93, 107 P.3d 141 (2005) (prior out of state convictions adequately proved with copies of minute orders, defendant's guilty pleas, charging documents

identifying prior crimes and their elements, and certified abstract of judgment, taken together); *State v. Payne,* 117 Wash.App. 99, 105–06, 69 P.3d 889 (2003) (prior conviction from Canada proved when State introduced evidence of the warrant, information, sentence, transcript of defendant's plea and submissions, and warrant of committal). *State v. Booker*, 143 Wash. App. 138, 141–42, 176 P.3d 620, 622 (2008) (At sentencing, the State presented certified copies of the Order of Sentence and Commitment to Illinois Department of Corrections, the Statement of Conviction/Disposition, and the Information filed in Booker's prior firearm case to prove that his Illinois firearm conviction was comparable).

Here, to show the Utah burglary conviction was comparable to a Washington burglary the state presented the resentencing court with three certified documents pertaining to the Utah matter: (1) the Judgment, Sentence (Commitment), (2) the Information, (which incorporated a probable cause statement) and (3) the Statement of Defendant Certificate of Counsel & Order. (All three documents contained within CP 81). As argued to the sentencing court, the Information alleged defendant did "enter or remain unlawfully *in the building of Dr. Weems and Dr. Crane* with the intent to commit a theft." (Emphasis added). The probable cause statement recites that "on November 14, 1990 at *168 E. 5900 S., Murray, UT*, the defendant and a juvenile were arrested exiting the building." (Emphasis

added). The defendant's plea statement includes the language "on or about November 14, 1990 at *168 E. 5900 S., Murray, UT* in Salt Lake County the defendant Bud Flowers…" (Emphasis added).

The state agrees that the Utah statute defines burglary more broadly by including watercraft and aircraft. However, taken together, the records admitted at the resentencing hearing clearly show, under a preponderance standard, that the location of the Utah burglary was not a watercraft or aircraft, but rather the building of Drs. Weems and Crane which had a specific street address, 168 E. 5900 S., Murray, UT. The court did not err in finding that the Utah burglary conviction was comparable to a Washington burglary and including the conviction in the offender score.

Appellant asserts that "the Judgment and Sentence for the present matter indicates that the "date of sentence" for the burglary was October 7, 1990, yet the date of crime is somehow November 15, 1990," referring to Judgment and Sentence, CP 90-102. (Appellant's brief page 5). Appellant is wrong. The Amended Judgment and Sentence, CP 84, page 4, indicates the date of sentence for the Utah burglary to building conviction as 12-07-90 and the date of crime as 11-15-90.

V. CONCLUSION

For the above stated reasons defendant's sentence should be affirmed.

Respectfully submitted this 21 day of November, 2016.

TOM LADOUCEURWSBA # 19963
Chief Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November 21st, 2016.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

November 21, 2016 - 2:22 PM

Transmittal Letter

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